

Getting The Venire to Talk, Actually *Talk*

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So, okay. You buy the notion that getting a yes/no from a prospective juror doesn't really get you anywhere:

Q: Can you be fair to both sides?

A: Yes.

Q: Would you be more likely to believe the testimony of a police officer simply because he is a police officer?

A: No.

Q: If the State failed to prove each and every element of the offense beyond a reasonable doubt, what would your verdict be?

A: Not guilty.

Now what? You want them to talk so that you can see and hear where they are coming from – how do you do that?

Body Language

By “body language” we mean the video tape without the *words*, or – maybe better – everything that does not appear in the cold transcript, everything that can make you look and sound like a human being instead of a lawyer. It includes far more than hand gestures and whether or not you're pacing back and forth: tone of voice, inflection, nods of the head, uptightness vs. relaxation, the look in your eyes, eye contact, spontaneity, responsiveness, the ability to smile, and timing. Timing, which includes a certain amount of patience-with-pauses, with silence, is very important. If you look and sound like you're more interested in getting your next question out than in listening to the answer you're hearing, you'll be cutting them off before you even start the next question. They will sense – subliminally, of course – “This lawyer's about to pounce,” and they'll clam up. You've got to look and sound like you're interested in what they have to say. And you can't fake it. You've got to be interested in fact.

Agendas

But, you'll say, what if a juror goes off on a toot of her own? I may never get to the points I want to make. It's true. You may not. And in a way it's a trade-off. You've got your agenda and each individual juror has his or hers. But a major item on your agenda is, or ought to be, finding out what the juror's agenda is, what preconceived "script" they're bringing with them into the courtroom. Besides, we human beings tend to talk to people we trust. Oddly, the obverse is also true: we tend to trust people we talk to, people who show that they are willing to listen. Anything you can do to get the jurors to trust you is probably worth skipping the "education," which often means trying to tell them how they *should* think before you really know where they're coming from.

Follow-Up Questions

A good way to get jurors to talk more is to ask follow-up questions, suspending your agenda and going with the flow of theirs. These can be very, very short, as they often are in conversations actually observed between live human beings:

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| Q: Really? | Q: Wow, that must have hurt the kids. |
| Q: Say more. | Q: I don't see what you mean, exactly. |
| Q: Such as – | Q: Based on what? |
| Q: Like what? | Q: Was that the only time? |
| Q: For example – | Q: How did that strike you? |
| Q: What was that like? | Q: You were there doing – |
| Q: How often? | Q: You left there – when? |
| | Because – |

Form

Questioning prospective jurors is probably not something you should wing. Maybe Gerry Spence can do it. I can't. I find that if I just make myself a list of the subject areas I want to cover and try to take it spontaneously from there, I end up asking closed-ended questions – bad habits I try to break but which get reawakened and reinforced in almost every trial I do, first by the judge and then by the prosecutor. So I sit down in advance of trial and construct my questions with care to make them likely to elicit meaningful responses from the jurors.

This is, of course, largely a matter of form, but it's a different problem from the normal leading/non-leading distinction. "Have you ever broken your arm?" is leading in form, in "trial-form," but in everyday human conversation – which is the tone we're after in voir dire – it will rarely evoke a simple, "Yes." More likely something like, "Yeah – when I was a kid," or, "Uh-huh. I played football in high school," which takes you naturally to follow-up questions. A more likely one-word answer to this question is "No," but that gets followed up with, "Have you ever known anyone else who broke an arm?" which may evoke, "Yes. My son," or, "Oh, sure, lots of people."

The point is that in planning your questions you want to imagine how they're going to fly in court, the test being whether they're put in such a way that they invite juror responses. I keep a check list, not so much for content as for form, and I use it to get myself in the proper mind-set and tongue-mode as I write out my questions for trial the next day. It looks something like this:

1. How often do you see the son who's in college?
2. Where did you learn what you know about this?
3. I notice you hesitated for a minute – what were you thinking about?
4. Why do you think you feel that way? [How did that make you feel?]
5. How much thought have you given to this [subject]?
6. Can you think of why a person might confess to something he didn't do?
7. Have you ever supervised a group of people, or helped them to organize?
8. How much personal contact have you had with people of color?
9. Do you know anyone who's been treated for mental problems?
10. How do you feel about street drugs?
11. How much do you know about guns?
12. Why do you smile when you say that?
13. Do your friends and family feel the same way?
14. How much have your police friends talked to you about their jobs?
15. Do you know many people who drink?